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8 **UNITED STATES BANKRUPTCY COURT**  
9 **DISTRICT OF ARIZONA**

10 In re	Chapter 11 Proceedings
11 DANIEL LEWIS HENDON,	Case No. 2:11-bk-21164-SHG
12 Debtor.	<b>Adversary Case No. 2:16-ap-00127</b>
13 Diversified Funding Group, LLC, <i>et</i>	<b>DEFENDANTS BURCH &amp; CRACCHIOLO,</b>
14 <i>al.</i> ,	<b>P.A.'S AND ALAN MEDA'S MOTION TO</b>
15 Judgment Creditors,	<b>DISMISS, AND JOINDER IN DEFENDANTS</b>
16 v.	<b>ERNIE GARCIA, STEVEN JOHNSON,</b>
17 Daniel Hendon, Debtor, <i>et al.</i> ,	<b>VERDE AUTO SERVICES, LLC AND</b>
18 Defendants.	<b>VERDE INVESTMENTS, INC.'S MOTION</b>
	<b>TO DISMISS, FIRST AMENDED</b>
	<b>ADVERSARY COMPLAINT WITH</b>
	<b>PREJUDICE</b>

19 Pursuant to Fed. R. Civ. P. 12(b)(6), applicable under Bankruptcy Rule 7012(b)(6),  
20 Defendants Burch & Cracchiolo, P.A. and Alan Meda (collectively, "B&C Defendants") by  
21 and through undersigned counsel, hereby submit their Motion to Dismiss and Joinder in  
22 Defendants Ernie Garcia, Steven Johnson, Verde Auto Services, LLC and Verde Investments,  
23 Inc. (collectively, "Verde")'s Motion to Dismiss First Amended Complaint with Prejudice  
24 [Adv. Dkt. #47 ("Verde's MTD")] and move the Court to dismiss Plaintiffs' First Amended  
25 Adversary Complaint [Adv. Dkt. #30] (the "Amended Complaint") in the above Adversary  
26 Proceeding for failure to state a claim upon which relief can be granted.

27 B&C Defendants previously filed their Motion to Dismiss [Adv. Dkt. #13 ("B&C  
28 Defendants' 6/1/16 MTD")] as to Plaintiffs' original Complaint [Adv. Dkt. #1 ("Original

1 Complaint”)] because Plaintiffs lack standing to bring their 11 U.S.C. §548 fraudulent  
2 conveyance claims, as well as because such claims are time barred under 11 U.S.C. §§546 and  
3 548, and because Plaintiffs’ RICO claims fail to state a claim upon which relief can be granted  
4 and fail to satisfy Fed. R. Civ. P. 9(b). B&C Defendants’ 6/1/16 MTD also joined in  
5 Defendants Heather, Nell and Victoria Hendons’ Motion to Dismiss Plaintiffs’ Original  
6 Complaint. [Adv. Dkt. #5 (“Hendons’ 5/6/16 MTD”).] In response, Plaintiffs filed their  
7 Amended Complaint. As set forth herein and Verde’s MTD, the Amended Complaint does  
8 not cure Plaintiffs’ Original Complaint’s failings, and in fact adds additional counts, equally  
9 subject to dismissal for failure to state a claim. Accordingly, B&C Defendants move the  
10 Court to dismiss Plaintiffs’ Amended Complaint with prejudice without leave to further  
11 amend because such would be futile.

12 This Motion is supported by the accompanying Memorandum of Points and  
13 Authorities, B&C Defendants’ 6/1/16 MTD (which incorporated Hendons’ 5/16/16 MTD),  
14 and Verde’s MTD, in which B&C Defendants hereby join and incorporate herein in its  
15 entirety—including all its recitation of facts, arguments and legal precedents—by this joinder.

## 16 **MEMORANDUM OF POINTS AND AUTHORITIES**

### 17 **I. INTRODUCTION AND BACKGROUND.**

#### 18 **A. Underlying Facts.**

19 This case involves a debt that Defendant Danny Hendon (“Hendon”) owes to Plaintiffs.  
20 Hendon and his related entities faced financial difficulties resulting in their bankruptcies in  
21 2010 and 2011. Hendon’s personal Chapter 11 bankruptcy proceeding, Case No. 2:11-bk-  
22 21164-SHG (the “Bankruptcy Case” or “BC”) is the underlying bankruptcy action for this  
23 Adversary case. B&C Defendants, and one of its shareholder attorneys, attorney Alan Meda,  
24 have represented Hendon in the Bankruptcy Case since substituting in the case as counsel on  
25 October 28, 2014. [BK Dkt. #44.] The additional facts set forth in Verde’s MTD, 3:2-6:8, are  
26 incorporated herein.

#### 27 **B. Procedural History.**

28 Plaintiffs filed the Original Complaint March 4, 2016, alleging fraudulent transfer

1 claims under 11 U.S.C. §548 and civil RICO claims under 18 U.S.C. §1962, against 21  
2 defendants.<sup>1</sup> On May 6, 2016, Defendants Heather, Nell and Victoria Hendons filed Hendons’  
3 5/6/16 MTD. [Adv. Dkt. #5.] On June 1, 2016, B&C Defendants filed B&C Defendants’  
4 6/1/16 MTD. [Adv. Dkt. #13.] On June 3, 2016, before the other Defendants filed their  
5 responsive pleadings, the parties entered a stipulation to extend response deadlines in an  
6 unsuccessful attempt to mediate a resolution. [Adv. Dkt. #14.] On July 13, 2016, the parties  
7 entered a third stipulation to extend response deadlines, providing Plaintiffs’ additional time  
8 up to August 1, 2016, to file their Amended Complaint and Defendants until September 15,  
9 2016, to respond to Plaintiffs’ amended pleading. [Adv. Dkt. #14.]

10 In light of the then pending motions to dismisses’ arguments, Plaintiffs offered to buy  
11 the Hendon Estate’s claims herein from the Liquidating Trustee (“Trustee”) under 11 U.S.C.  
12 §363. On July 1, 2016, the Trustee filed a Motion for Sale of Property Free and Clear of  
13 Liens/Motion to Approve Sale of Certain Liquidating Trust Assets Free and Clear of Liens,  
14 Claims, Encumbrances, and Interests, or in the Alternative, Confirming that Bankruptcy Court  
15 Approval is not Required for the Trustee to Sell Such Assets. In said motion, the Trustee  
16 sought bankruptcy court approval to sell the adversary claims that were set forth, or could be  
17 set forth, in Plaintiffs’ Complaint, for 10% of any recovery and relinquishing any say in the  
18 resolution of such claims. [BC Dkt. #180, (“Motion to Approve Sale of Claims”).] On July  
19 17, 2016, Verde Defendants, K. Carroll, and Hendon all filed objections to the motion [BC  
20 Dkt. ##193-95]; which objections Plaintiffs opposed. [BC Dkt. #198.]

21 On July 15, 2016, the Court held a hearing on the Motion to Approve Sale of Claims, at  
22 which the Verde Defendants, in an effort to avoid litigating Plaintiffs’ frivolous claims,  
23 offered a competing bid of \$200,000 cash for claims subject to the Motion to Approve Sale of  
24 Claims, and the Court ordered an evidentiary hearing on the competing bids. [BC Dkt. #203  
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26 <sup>1</sup> The Trustee filed a Motion to Convert Mr. Hendon’s Chapter 11 case to a Chapter 7 case on  
27 April 29, 2016. [BC Dkt. #166.] Mr. Hendon opposed the motion. [BC Dkt. #176.] On July  
28 26, 2016, the Court held a hearing on the motion to convert. [BC Dkt. #211 and #213.] The  
Court has yet to rule on the motion.

1 and #207.] On July 25, 2016, the Court held the evidentiary hearing on the Motion to  
2 Approve Sale of Claims. [BC Dkt. #210 and #214.] *See also* Verde Defendants’ Supplement  
3 Re: Objection to Motion to Approve Sale [BC Dkt. #205], 2:11-16:11; Verde Defendants’  
4 Trial Brief Re: Sale of Certain Liquidating Trust Assets [BC Dkt. #208], 10:4-15:5. The  
5 Court has yet to rule on the motion. Accordingly, the Trustee continues to own all the Hendon  
6 Estate’s causes of action.

### 7 **C. The Amended Complaint.**

8 Plaintiffs filed their Amended Complaint on August 4, 2016, adding 6 additional  
9 counts, for a total of 8 counts; and adding 5 additional defendants and eliminating 1, for a net  
10 total of 25 defendants; alleging all counts against all Defendants. [Adv. Dkt. #20.] The  
11 Amended Complaint specifically names one or both of the B&C Defendants in only 12 of 201  
12 paragraphs. [Amended Complaint, ¶¶ 11, 12, 53, 66, 67, 68, 97, 148, 159, 177, 178 and 179.]

### 13 **II. LEGAL STANDARD.**

14 A claim will be dismissed under Rule 12 (b)(6), “if it lacks a cognizable legal theory or  
15 if it alleges insufficient facts to support a cognizable legal theory.” *Balistreri v. Pacifica*  
16 *Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1990).<sup>2</sup> Dismissal under Rule 12(b)(6) is therefore  
17 appropriate if the complaint fails to include “factual allegations, either direct or inferential,  
18 respecting each material element necessary to sustain recovery” under Plaintiff’s legal  
19 theories. *Gagliardi v. Sullivan*, 513 F.3d 301, 305 (1st Cir. 2008).

20 To defeat B&C Defendants’ Rule 12(b)(6) Motion, Plaintiff must plead facts showing  
21 that “a claim has facial plausibility”—“factual content that allows the court to draw the  
22 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*  
23 *Iqbal*, 556 U.S. 662, 678 (2009), *citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).  
24 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed  
25 factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to

26 \_\_\_\_\_  
27 <sup>2</sup> Lack of *statutory* standing is properly attacked as a failure to state a claim under Rule  
28 12(b)(6). *Petzschke v. Century Aluminum Co. (In re Century Aluminum Co. Sec. Litig.)*, 729  
F.3d 1104, 1109 (9th Cir. 2013).

1 relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of  
2 a cause of action will not do.” *Twombly*, 550 U.S. at 555. Moreover,

3 When faced with two possible explanations, only one of which can be true and  
4 only one of which results in liability, plaintiffs cannot offer allegations that are  
5 “merely consistent with” their favored explanation but are also consistent with  
6 the alternative explanation. *Iqbal*, 556 U.S. at 678 (internal quotation marks  
7 omitted). Something more is needed, such as facts tending to exclude the  
8 possibility that the alternative explanation is true, *see Twombly*, 550 U.S. at 554,  
9 in order to render plaintiffs’ allegations plausible within the meaning of *Iqbal*  
10 and *Twombly*.

11 *Petzschke*, 729 F.3d at 1108.

12 Finally, while the Court considers well-pleaded facts as true when considering a Rule  
13 12(b)(6) motion, it does not “accept as true allegations that are merely conclusory,  
14 unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State*  
15 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Martinez v Goddard*, 521 F. Supp. 2d 1002,  
16 1011 (D. Ariz. 2007)(“court need not accept as true conclusory allegations, legal  
17 characterizations, unreasonable inferences, or unwarranted deductions of facts”). Thus, mere  
18 legal conclusions “are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 678-79.

### 19 **III. ARGUMENT.**

#### 20 **A. Plaintiffs’ 11 U.S.C. §547-§550 and A.R.S. §44-1004 Claims Fail for** 21 **Numerous Reasons.**

22 As set forth in Verde’s MTD, 6:20-10:5 and fully incorporated herein, Plaintiffs’ 11  
23 U.S.C. §547-§550 and A.R.S. §44-1004 avoidable transfer claims fail to state claims upon  
24 which relief can be granted for numerous reasons.

#### 25 **1. Plaintiffs Lack Standing to Assert Claims under 11 U.S.C.** 26 **§547- §550 and A.R.S. §44-1004.**

27 As set forth in Verde’s MTD, 6:20-8:18, Plaintiffs lack standing to assert claims under  
28 11 U.S.C. §§548-550 and A.R.S. §44-1004. Because the Avoidance Actions are expressly  
reserved in the Plan for the benefit of the creditors, any 11 U.S.C. §§548-550 and A.R.S. §44-  
1004 claims remain the property of the Hendon Estate after the confirmation. *See, e.g., In re*  
*Trident Shipworks, Inc.*, 262 B.R. 107, 109 (Bankr. M.D. Fla. 2001) (chapter 11 debtor has

1 standing to institute actions to recover or set aside post-confirmation voidable transfers  
2 pursuant to §549). Accordingly, Plaintiffs, individual creditors, lack standing to bring such  
3 claims against B&C Defendants. *In re Vandevort*, 2009 WL 7809927, \*5-6 (9th Cir. B.A.P.  
4 2009); *In re Saylor*, 178 B.R. 209, 215 (9th Cir. B.A.P. 1995), *aff'd.*, 108 F.3d 219 (9th Cir.  
5 1997); *In re Curry and Sorensen, Inc.*, 57 B.R. 824, 827- 28 (9th Cir. B.A.P. 1986); *In re Hoyt*,  
6 447 B.R. 283, 287-88 (Bankr. D. Ariz. 2011); *In re Pac. Gas & Elec. Co.*, 281 B.R. 1, 14  
7 (Bankr. N.D. Cal. 2002), *aff'd.*, 433 F.3d 1115 (9th Cir. 2006).

8 Thus, Plaintiffs' alleged fraudulent transfer claims under 11 U.S.C. §§547-550 and  
9 A.R.S. §44-1004, are claims of the Hendon Estate and, as such, can only be asserted by the  
10 Trustee and not by individual creditors such as Plaintiffs.

11 **2. 11 U.S.C. §544 and §548 Do Not Apply to Post-petition**  
12 **Transfers--the Only Transfers Alleged Against B&C**  
13 **Defendants.**

14 In addition, as set forth in Verde's MTD, 7:11-16, there is no cause of action for a post-  
15 petition fraudulent transfer under 11 U.S.C. §544 and §548. Mr. Hendon filed his petition on  
16 July 25, 2011. Therefore §544 and §548 are not applicable to any alleged transfers occurring  
17 after July 25, 2011. Thus, the B&C Defendants have only represented Mr. Hendon post-  
18 petition. Accordingly, Plaintiffs' allegations of avoidable transfers against B&C Defendants  
19 are all post-petition and therefore fail to state a claim under 11 U.S.C. §544 and §548.<sup>3</sup>

20 **3. Plaintiffs also Fail to State an Avoidable Transfer Claim**  
21 **Against B&C Defendants Because There was no Alleged**  
22 **Transfer of Mr. Hendon's Property.**

23 As also set forth in Verde's MTD, 8:19-9:16, 11 U.S.C. §548 permits the Trustee to  
24 avoid a transfer of "an interest of the debtor in property"; A.R.S. § 44-1004(A) defines only  
25 "transfer made . . . by a debtor" as fraudulent; and 11 U.S.C. §549 only permits avoidance of a

26 <sup>3</sup> Moreover, as set forth in Hendons' 5/16/16 MTD, 6:24-7:20, incorporated in B&C  
27 Defendants' 6/1/16 MTD and herein, because no trustee was appointed, Plaintiffs had until "2  
28 years after the entry of the order of release (July 25, 2011 [Amended Complaint, ¶45])," to  
bring any alleged §548 transfer prepetition claims pursuant to 11 U.S.C. §546(a). Plaintiffs  
brought this action on March 4, 2016. Thus, any §548 prepetition claims are also time barred.

1 transfer of “property of the estate.” Thus, even if Plaintiffs did obtain the Trustee’s causes of  
2 action, the claims against B&C Defendants would still be subject to dismissal because  
3 Plaintiffs were never entitled to any of the property that Plaintiffs allege was transferred to  
4 B&C Defendants.

5 The Amended Complaint alleges that during 2015, the B&C Defendants “accepted at  
6 least (7) wire transfers of approximately \$45,000 from Heather Hendon to pay for Debtor’s  
7 legal fees, knowing that said funds are the proceeds from the fraudulent sale of the car wash.”  
8 [Amended Complaint, ¶66.] This was neither a transfer made by the debtor, Hendon, nor a  
9 transfer of his interest in property or property of his estate. First, as discussed in Verde MTD  
10 and herein, Plaintiffs’ allegations of a “fraudulent sale of the car wash” fail the specificity  
11 requirements of Fed. R. Civ. P. 9(b). Second, Plaintiffs allege proceeds from the Car Wash  
12 Entities’ bankruptcy (not Hendon’s Estate) were used by Heather Hendon to pay legal fees  
13 owed by Hendon to B&C Defendants. Plaintiffs are not creditors of Heather Hendon, and  
14 contrary to Plaintiffs’ deficient fraud allegations, she transferred her own property. *See, e.g.,*  
15 *In re Milby*, 2016 WL 778164, at \*3 (9th Cir. BAP. Feb. 24, 2016) (“[O]nly a creditor of a  
16 debtor/transferor can seek avoidance of the debtor’s fraudulent transfers.”).

17 **4. Plaintiffs’ Avoidable Transfer Claim Against B&C**  
18 **Defendants Also Fails Because B&C Defendants were not**  
19 **Transferee’s of the Estate’s Property.**

20 As also set forth in Verde’s MTD, 9:17-9:27, Plaintiffs’ avoidable transfer claim can  
21 only be recovered from transferees of the Hendon Estate’s property. As discussed above,  
22 there was no transfer of the Hendon Estate’s property to B&C Defendants and therefore they  
23 were not transferees of the Hendon Estate’s property.

24 **5. Plaintiffs’ Avoidance Actions are Further Barred by *In Pari***  
25 ***Delicto*.**

26 As set forth in Verde MTD, 10:1-10:5, if Plaintiffs do obtain claims of the Trustee,  
27 Plaintiffs would then stand in the shoes of the Trustee, who stands in the shoes of Hendon, and  
28 therefore Hendon’s involvement alleged in the Amended Complaint further bars Plaintiffs’  
fraudulent conveyance claims on *in pari delicto* grounds.

1                   **B. Plaintiffs’ 18 U.S.C. §1343 Wire Fraud and 18 U.S.C. §1956 Money**  
2                   **Laundrying Claims Fail For Lack of Standing.**

3                   As set forth in Verde’s MTD, 10:6-15, Plaintiffs’ 18 U.S.C. §1343 Wire Fraud and 18  
4 U.S.C. §1956 Money Laundrying Claims fail for lack of standing because neither creates a  
5 private cause of action. *Erickson v. Long Beach Mortg. Co.*, 2011 U.S. Dist. LEXIS 20919,  
6 2011 WL 830727 (W.D. Wash. Mar. 2, 2011), *aff’d*, 473 Fed. Appx. 746 (9th Cir. 2012).

7                   **C. Plaintiffs’ 18 U.S.C. §1962 Civil RICO Claim Against B&C**  
8                   **Defendants Fails for Numerous Reasons.**

9                   Likewise, as set forth in Verde’s MTD, 10:16-23:24 and fully incorporated herein,  
10 Plaintiffs’ 18 U.S.C. §1962 RICO claim fails to state a claim upon which relief can be granted  
11 for numerous reasons.<sup>4</sup> As set forth in Verde’s MTD, 10:17-12:16, courts must scrutinize  
12 RICO claims to prevent plaintiffs defeating motions to dismiss by tacking on “self-serving  
13 conclusions that the conduct amounted to racketeering.” *Miranda v. Ponce Fed. Bank*, 948  
14 F.2d 41, 44 (1st Cir. 1991). Courts must evaluate the RICO allegations separately as to each  
15 defendant and they must satisfy Fed. R. Civ. P. 9(b)’s heightened pleading requirements. As  
16 Verde’s MTD correctly notes, Plaintiffs here attempt to recast a meritless fraudulent transfer  
17 claim for which they lack standing, by alleging an equally meritless RICO claim.

18                   **1. Plaintiffs’ RICO Claim Likewise Fails for Lack of Standing.**

19                   As set forth in Verde’s MTD, 12:17-13:5, Plaintiffs’ alleged post-petition RICO claims  
20 also may only be asserted by the Trustee and thus fail for lack of standing. *Estate of Spirtos v.*  
21 *One San Bernadino Cty, Superior Court Case Numbered SPR 02211*, 443 F.3d 1172, 1174-76  
22 (9th Cir. 2006); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1419-20 (9th Cir. 1995).

23                   **2. Plaintiffs Have Not Alleged a Cognizable RICO Injury.**

24                   As set forth in Verde’s MTD, 13:6-15:12, Plaintiffs also lack standing regarding  
25 Plaintiffs’ 18 U.S.C. §1962 claim and the claim fails because Plaintiffs have not alleged  
26 sufficient facts to establish a valid RICO injury or proximate cause. 18 U.S.C. §1964(c); *Hill*

27 <sup>4</sup> As set forth in Verde’s MTD, 23:5-24, Plaintiffs’ inability to allege a violation of 18 U.S.C.  
28 §1962(c) means they also cannot allege a violation of 18 U.S.C. §1962(d).



1 v. *Opus Corp.*, 841 F. Supp. 2d 1070, 1089 (C.D. Cal. 2011)(RICO claim requires plaintiffs  
2 allege defendants' violation of §1962 caused injury to their business or property). As  
3 discussed in Verde's MTD, 13:14-14:13, RICO standing requires Plaintiffs to identify harm to  
4 a "specific business or property interest," *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005),  
5 and an "expectancy interest" is insufficient. *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083,  
6 1087 (9th Cir. 2002). As noted in the Verde MTD, Plaintiffs, unsecured creditors of Hendon  
7 by virtue of their judgment against him, had only an expectancy interest in property of the  
8 Hendon Estate. *Hill*, 841 F. Supp. 2d at 1091. Moreover, Plaintiffs do not have even an  
9 expectancy interest in the property that was allegedly transferred by Heather Hendon to pay  
10 Hendon's legal fees, because it was not property of the Hendon Estate. Thus, Plaintiffs cannot  
11 establish RICO standing or a RICO injury.

12 As set forth in Verde MTD, 14:14-15:12, Plaintiffs have also failed to allege facts  
13 sufficient to demonstrate proximate cause required for a cognizable RICO injury. In addition  
14 to the arguments set forth in Verde MTD, 14:14-15:12, Plaintiffs have likewise failed to allege  
15 facts sufficient to demonstrate that any of B&C Defendants' actions were the proximate cause  
16 of Plaintiffs' alleged injury. B&C Defendants provided legal services to Mr. Hendon as of  
17 October 28, 2014. The mere provision of legal services does not proximately cause alleged  
18 RICO damages. *See, e.g., RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682  
19 F.3d 1043, 1051 n.7, (D.C. Cir. 2012)(appellate courts have declined to extend RICO liability  
20 under §1962(c) to an attorney's provision of routine legal services); *Walter v. Drayson*, 538  
21 F.3d 1244, 1248-49 (9th Cir. 2008)(performing legal services does not result in liability under  
22 §1962(c)); *Baumer v. Pacht*, 8 F.3d 1341, 1344-45 (9th Cir. 1993)(same). As in *Baumer*,  
23 *Walter* and *RSM*, B&C Defendants' legal advice and services were consistent with the normal  
24 business practices of an attorney representing his client under the given circumstances and did  
25 not proximately cause Plaintiffs any alleged RICO damages.

### 26 3. Plaintiffs' RICO Claim is also Barred by *In Pari Delicto*.

27 As also set forth in Verde's MTD, 15:13-15:23 and discussed above, if Plaintiffs  
28 obtain claims of the Trustee, Plaintiffs would ultimately stand in the shoes of Hendon and

1 Plaintiffs' alleged RICO claim would be barred by the doctrine of *in pari delicto*. *See, e.g.,*  
2 *Republic of Iraq v. ABB AG*, 768 F.3d 145, 162-63 (2d Cir. 2014).

3 **4. Plaintiffs' RICO Claim does not Adequately Allege a**  
4 **Continuous Pattern of Racketeering Activity.**

5 As also set forth in Verde's MTD, 15:24-23:14, Plaintiffs' alleged RICO claim fails to  
6 adequately allege a "pattern of racketeering activity." First, as set forth in Verde MTD, 16:1-  
7 18:9, Plaintiffs insufficiently allege a "continuous pattern." As was true with the Original  
8 Complaint, the Amended Complaint alleges a series of fraudulent transfers in furtherance of a  
9 single and inherently terminable scheme (to "avoid collection of debts owed") aimed at a  
10 discrete set of victims (Plaintiffs and other creditors) as the "racketeering activity." As such,  
11 Plaintiffs can prove no set of facts demonstrating either closed- or open-ended continuity.  
12 *See e.g., Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265  
13 (D.C. Cir. 1995) (the combination of a single scheme, single injury, and few victims  
14 "makes it virtually impossible for plaintiffs to state a RICO claim.").

15 As set forth in Hendons' 5/16/16 MTD, incorporated in B&C Defendants' 6/1/16  
16 MTD, open-ended continuity is lacking where the plaintiff has not alleged facts showing  
17 that the racketeering acts "include a specific threat of repetition extending indefinitely  
18 into the future." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989). *See also Ace Pro*  
19 *Sound & Recording, LLC v. Albertson*, 512 F. Supp. 2d 1259 1267 (S.D. Fla. 2007) (the  
20 racketeering activity must "inherently include[] the potential for repetition in perpetuity");  
21 *Turner v. Cook*, C 01-3884 CW, 2002 WL 34420751 (N.D. Cal. Aug. 28, 2002) (no pattern  
22 of racketeering activity where predicate acts were "finite in nature").

23 Here, there is no threat of repetition in perpetuity because the alleged bankruptcy fraud  
24 and fraudulent transfers are "inherently terminable"—once the assets are fraudulently  
25 transferred, the scheme necessarily terminates. "[I]t is significant that the alleged acts here all  
26 revolve around a bankruptcy. [T]he scheme here is "inherently terminable" in that it  
27 necessarily ended with the bankruptcy to which it related. In these circumstances, plaintiffs'  
28 allegations are not sufficient to suggest a threat of continuity." *First Capital Asset Mgmt.,*  
*Inc. v. Brickelbush, Inc.*, 150 F. Supp. 2d 624, 634 (S.D.N.Y. 2001), *aff'd sub nom., First*

1 *Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004)(citations and  
2 quotations omitted). Likewise, the alleged scheme here terminated once the alleged  
3 fraudulent transfers were completed, and the threat of criminal conduct does not extend  
4 indefinitely into the future. *H.J. Inc.*, 492 U.S. at 242. In the Ninth Circuit, allegations of a  
5 single purpose scheme are insufficient to establish open-ended continuity. *Religious Tech.*  
6 *Ctr. v. Wollersheim*, 971 F.2d 364, 366 (9th Cir. 1992); *Durning v. Citibank, Int'l*, 990 F.2d  
7 1133, 1139 (9th Cir. 1993).

8 Where, as here, plaintiff alleges injuries arising out of a closed set of discrete predicate  
9 acts that do not threaten to repeat in the future, plaintiff must prove closed-ended continuity.  
10 *H.J. Inc.*, 492 U.S. at 242; *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d at 182.  
11 However, Plaintiffs' allegations do not support closed-ended continuity. The Ninth Circuit has  
12 held that where a single scheme is alleged against a discrete set of victims, RICO's pattern  
13 closed-ended continuity requirement is not met. *See, e.g., Medallion Television Enters. v.*  
14 *SelecTV of California, Inc.*, 833 F.2d 1360, 1363 (9th Cir. 1987) (no threat of continuity in a  
15 case involving "a single alleged fraud with a single victim"); *Sever v. Alaska Pulp Corp.*, 978  
16 F.2d 1529 (9th Cir. 1992) (defendants' single purpose scheme to terminate plaintiff's  
employment does not constitute a pattern for purposes of RICO).

##### 17 **5. Plaintiffs do not Adequately Alleged an Association in Fact** 18 **Enterprise.**

19 As also set forth in Verde's MTD, 18:10-19:25, Plaintiffs' alleged RICO claim fails to  
20 adequately allege an "association in fact enterprise" pursuant to *Boyle v. United States*, 556  
21 U.S. 938, 938-39 (2009).<sup>5</sup> Like as to Verde, Plaintiffs have not alleged any facts  
22 demonstrating B&C Defendants were aware of the alleged parallel schemes allegedly carried  
23 out by other alleged members of the alleged enterprise.

24 Moreover, even assuming, *arguendo*, that there was an enterprise under RICO (which  
25 as discussed above there was not), Plaintiffs' RICO claim as to the B&C Defendants also fails  
26 because B&C Defendants' role was solely providing legal services regularly provided by

27 <sup>5</sup> Nor do Plaintiffs' contrary conclusory allegations in the Amended Complaint defeat a  
28 motion to dismiss. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

1 bankruptcy counsel to a bankrupt debtor. Pursuant to *Reves v. Ernst & Young*, 507 U.S. 170,  
2 173, 179, 185 (1993), to meet the “conduct or participate requirement” element of §1962(c), a  
3 defendant “must participate in the operation or management of the enterprise itself.” *See also*  
4 *Walter*, 538 F.3d at 1248-49 (performing legal services does not rise to the level of direction  
5 for liability under §1962(c)); *Baumer*, 8 F.3d at 1344-45)(providing legal services in the  
6 normal course of representing a client alleged to have violated RICO does not satisfy the  
7 “conduct or participate requirement” of §1962(c)); *RSM*, 682 F.3d at 1051, n.7 (“circuit courts  
8 of appeals have declined to extend RICO liability under §1962(c) to an attorney’s provision of  
9 routine legal services.”) As in the above cases, B&C Defendants’ legal advice and services  
10 were consistent with normal business practices of an attorney representing a client under these  
11 given circumstances and do not satisfy the “conduct or participate requirement” of §1962(c).

12 Likewise, Plaintiffs cannot satisfy the additional RICO elements that B&C Defendants  
13 were “aware of the essential nature and scope of the enterprise and intended to participate in  
14 it,” *Baumer*, 8 F.3d at 1346, or that B&C Defendants, “knowingly agree[d] to facilitate a  
15 scheme which includes the operation or management of a RICO enterprise” *United States v.*  
16 *Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004). Nor does receiving payments for their legal  
17 services from one alleged to have violated RICO result in RICO liability as to B&C  
18 Defendants. *See, e.g., RSM*, 682 F.3d at 1050-51 (source of fees does not support plausible  
19 inference of awareness of the essential nature and scope of the RICO enterprise).

20 **6. Plaintiffs do not Adequately Plead a RICO Predicate**  
21 **Offense.**

22 As also set forth in Verde’s MTD, 19:26-23:14, contrary to their conclusory  
23 allegations, Plaintiffs have not adequately pled a RICO predicate offense.

24 **7. Plaintiffs’ RICO Claim also does not meet Rule 9(b)’s**  
25 **Particularity Requirements.**

26 Finally, as discussed in Verde’s MTD, 11:25-12:16, Plaintiffs’ RICO claims against  
27 B&C Defendants also should be dismissed because Plaintiffs’ allegations fail to comply with  
28 Fed. R. Civ. P. 9(b)’s particularity requirement. Rule 9(b) applies to civil RICO fraud claims

1 such as alleged here. *See, e.g., Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065-66 (9th Cir.  
2 2004); *Mostowfi v. 12 Telecom Int'l, Inc.*, 269 Fed. Appx. 621, 623 (9th Cir. 2008); *Williams*  
3 *v. Flying J, Inc.*, 2015 Bankr. LEXIS 2820, \*56, 64-65 (Bankr. W.D. Tenn. Aug. 21, 2015).

4 Under Rule 9(b), Plaintiffs' RICO allegations must specify the time, place, and specific  
5 contents of the alleged underlying fraudulent RICO predicate acts as to each defendant, and  
6 must differentiate allegations as to each defendant so as to inform each defendant separately of  
7 the allegations surrounding each's alleged participation in the fraud, rather than merely  
8 lumping multiple defendants together. *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir.  
9 2007). Additionally, Plaintiffs must show scienter. *Williams*, 2015 Bankr. LEXIS 2820 at  
10 \*56, 64-65. Plaintiffs' allegations regarding B&C Defendants' alleged acts fail to satisfy Rule  
11 9(b) and thus should be dismissed. *See, e.g., Mostowfi*, 269 Fed. Appx. at 624 (plaintiffs'  
12 RICO action failed Rule 9(b) because statements failed to state the "who, what, where, when  
13 and how" of the alleged misconduct); *Williams*, 2015 Bankr. LEXIS 2820 at \*64-65 (failure to  
14 satisfy Rule 9(b) causes the dismissal of a RICO claim for failure to plead the predicate acts).

15 **D. Plaintiffs' Negligence and Negligence Per Se Claims Against B&C**  
16 **Defendants Also Fail.**

17 As set forth in Verde's MTD, 25:2-27:13 and fully incorporated herein, Plaintiffs'  
18 Negligence and Negligence Per Se claims fail to state claims upon which relief can be granted  
19 because: (1) any alleged negligence claims are displaced by the Uniform Fraudulent Transfer  
20 Act; (2) Plaintiffs have no negligence per se claim under Arizona law because there was no  
21 violation of a public safety statute and no causation; and (3) Plaintiffs cannot establish that  
22 B&C Defendants owed them a duty, breached any such duty to them, and or that any such  
23 alleged breach was the actual and proximate cause of their alleged damages. *Glaze v. Larsen*,  
24 207 Ariz. 26, 29 (2004); *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546 (1990).

25 Plaintiffs are adverse parties to B&C Defendants' client Hendon, and as such their  
26 negligence allegations against B&C Defendants fail as a matter of Arizona law. Under  
27 Arizona law, a claim of negligence by a non-client against an attorney in the course of  
28 representing a client, and whether the attorney owes a duty to the non-client, is analyzed under

1 the Restatement (Third) of the Law Governing Lawyers, §51(3). *Paradigm Ins. Co. v.*  
2 *Langerman Law Offices, P.A.*, 200 Ariz. 146, 152-53 (2001); *Capitol Indem. Corp. v. Fleming*,  
3 203 Ariz. 589, 591-92 (App. 2002). Restatement, §51(3) provides an attorney representing a  
4 client has a duty to an adverse non-client when: “(a) the lawyer knows that a client intends as  
5 one of the primary objectives of the representation that the lawyer’s services benefit the non-  
6 client; (b) such a duty would not significantly impair the lawyer’s performance of obligations  
7 to the client; and (c) the absence of such a duty would make enforcement of those obligations  
8 to the client unlikely.” *Paradigm*, 200 Ariz. at 152-153, *quoting* Restatement § 51(3).

9 Thus, contrary to Plaintiffs’ allegations, B&C Defendants did not owe Plaintiffs a duty  
10 under Restatement, §51(3). First, the Amended Complaint does not allege, nor can it, that  
11 Hendon intended that a primary objective of his representation was that B&C Defendants’  
12 services benefit Plaintiffs, or that B&C Defendants knew of any such intention. Second,  
13 recognition of such a duty would “significantly impair” B&C Defendants’ performance of  
14 their obligations to Hendon the client.”<sup>6</sup> This is especially true where, as here, the adverse  
15 non-client is also represented by counsel. Plaintiffs, adverse parties with their own counsel in  
16 an arm’s length transaction, are too remote from B&C Defendants to be entitled to  
17 protection under Restatement §51. *See, e.g., Wetherill v. Basham*, 197 Ariz. 198 (App.  
18 2000)(refusing to impose on attorney a duty of care to an adverse non-client); *Kremser*, 201  
19 Ariz. at 419, 36 P.3d at 767 (adversarial circumstances where no duty is expressly assumed  
20 and no shared benefit exists, no risk of liability to non-client); *Accord Kravitz v. The Am.*  
21 *Jewish Comm.*, 2006 U.S. Dist. LEXIS 68601, \*3-4 (D. Ariz. Sept. 21, 2006).

22 <sup>6</sup> Restatement § 51(3), cmt. g illustrates the importance of these two criteria in deciding the  
23 duty question: “A nonclient’s claim under Subsection (3) is recognized only when doing so  
24 will both implement the client’s intent and serve to fulfill the lawyer’s obligations to the client  
25 without impairing performance of those obligations in the circumstances of the representation.  
26 ***A duty to a third person hence exists only when the client intends to benefit the third person***  
27 ***as one of the primary objectives of the representation. . . . Without adequate evidence of***  
28 ***such an intent, upholding a third person’s claim could expose lawyers to liability for***  
***following a client’s instructions in circumstances where it would be difficult to prove what***  
***those instructions had been.*** Threat of such liability would tend to discourage lawyers from  
following client instructions adversely affecting third persons.” (Emphasis added.)

1 Thus, Plaintiffs' Negligence and Negligence Per Se Claims should also be dismissed.

2 **E. Plaintiffs' Alter Ego Liability, Punitive Damages and Constructive Trust**  
3 **Claims Also Require Dismissal.**

4 Likewise, as set forth in Verde's MTD, 23:24-25:1 and 27:14-18 and fully incorporated  
5 herein, Plaintiffs have no claims for Alter Ego Liability, Punitive Damages or Constructive  
6 Trust, and such claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

7 **F. This Court Should Dismiss the Amended Complaint with Prejudice,**  
8 **Without Leave to Further Amend Because Such Would be Futile.**

9 As discussed in Section I, *supra*, pp. 2-4, Plaintiffs have already amended their  
10 Complaint once in the face of pending motions to dismiss. Their Amended Complaint is  
11 subject to dismissal for the same reasons. For reasons set forth in Verde's MTD and herein,  
12 further attempts to amend Plaintiffs' Amended Complaint would be futile. Accordingly, the  
13 Court should dismiss the Amended Complaint with prejudice and deny any further request to  
14 amend as futile. *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1143 (9th Cir.  
15 2015) (leave to amend may be denied if it would be "futile in saving the plaintiff's suit").

16 **IV. CONCLUSION.**

17 For the foregoing reasons, B&C Defendants respectfully request that the Court dismiss  
18 Plaintiffs' First Amended Adversary Complaint against B&C Defendants with prejudice.

19 DATED September 15, 2016.

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1 **CERTIFICATE OF SERVICE**

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